

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHELE A. BUCKHANAN,)	
)	No. CV-07-385-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND REMANDING FOR ADDITIONAL
MICHAEL J. ASTRUE,)	PROCEEDINGS PURSUANT TO
Commissioner of Social)	SENTENCE FOUR 42 U.S.C. §
Security,)	405(g)
)	
Defendant.)	
)	
)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 17, 24.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Thomas M. Elsberry represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, **DENIES** Defendant's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings.

JURISDICTION

Plaintiff Michele A. Buckhanan (Plaintiff) protectively filed for Supplemental Security Income on September 20, 2004. (Tr. 87.) Plaintiff alleged an onset date of January 1, 2002. (Tr. 87.) Benefits were denied initially and on reconsideration. (Tr. 39, 35.)

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND REMANDING FOR ADDITIONAL PROCEEDINGS PURSUANT TO
SENTENCE FOUR 42 U.S.C. § 405(g)-1

1 Plaintiff requested a hearing before an administrative law judge
2 (ALJ), which was held before ALJ Paul Gaughen on March 22, 2007. (Tr.
3 321-57.) Plaintiff was represented by counsel and testified at the
4 hearing. (Tr. 334-345.) Medical expert Ronald Klein, Ph.D., and
5 vocational expert Tom Moreland testified. (Tr. 324-34, 346-52.)
6 Plaintiff's roommate, Jeffrey P. Townsend, also testified. (Tr. 353-
7 56.) The ALJ denied benefits (Tr. 18-29) and the Appeals Council
8 denied review. (Tr. 5.) The instant matter is before this court
9 pursuant to 42 U.S.C. § 405(g).

10 **STATEMENT OF FACTS**

11 The facts of the case are set forth in the administrative hearing
12 transcripts, the ALJ's decision, and the briefs of Plaintiff and the
13 Commissioner, and will therefore only be summarized here.

14 At the time of the hearing, Plaintiff was 37 years old. (Tr.
15 34.) Plaintiff completed the eighth grade and does not have a GED.
16 (Tr. 335.) Plaintiff's past work experience includes work as a food
17 server, food preparer, janitor and maid. (Tr. 337.) Plaintiff
18 testified she suffers from shoulder pain from an old injury, back
19 pain, pain in her right leg from an old injury, and knee pain. (Tr.
20 339.) Plaintiff testified that she is sad, depressed and has suicidal
21 thoughts. (Tr. 343.) Plaintiff also stated that she suffers from
22 severe migraines requiring her lay down until they pass. (Tr. 344-
23 45.)

24 **STANDARD OF REVIEW**

25 Congress has provided a limited scope of judicial review of a
26 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold the
27 Commissioner's decision, made through an ALJ, when the determination
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1 is not based on legal error and is supported by substantial evidence.
2 See *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v.*
3 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's]
4 determination that a plaintiff is not disabled will be upheld if the
5 findings of fact are supported by substantial evidence." *Delgado v.*
6 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)).
7 Substantial evidence is more than a mere scintilla, *Sorenson v.*
8 *Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a
9 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir.
10 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
11 573, 576 (9th Cir. 1988). Substantial evidence "means such evidence
12 as a reasonable mind might accept as adequate to support a
13 conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
14 (citations omitted). "[S]uch inferences and conclusions as the
15 [Commissioner] may reasonably draw from the evidence" will also be
16 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
17 review, the court considers the record as a whole, not just the
18 evidence supporting the decision of the Commissioner. *Weetman v.*
19 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*,
20 648 F.2d 525, 526 (9th Cir. 1980)).

21 It is the role of the trier of fact, not this court, to resolve
22 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
23 supports more than one rational interpretation, the court may not
24 substitute its judgment for that of the Commissioner. *Tackett*, 180
25 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
26 Nevertheless, a decision supported by substantial evidence will still
27 be set aside if the proper legal standards were not applied in
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1 weighing the evidence and making the decision. *Browner v. Sec'y of*
2 *Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). Thus,
3 if there is substantial evidence to support the administrative
4 findings, or if there is conflicting evidence that will support a
5 finding of either disability or nondisability, the finding of the
6 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
7 1230 (9th Cir. 1987).

8 SEQUENTIAL PROCESS

9 The Social Security Act (the "Act") defines "disability" as the
10 "inability to engage in any substantial gainful activity by reason of
11 any medically determinable physical or mental impairment which can be
12 expected to result in death or which has lasted or can be expected to
13 last for a continuous period of not less than twelve months." 42
14 U.S.C. §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides that
15 a Plaintiff shall be determined to be under a disability only if his
16 impairments are of such severity that Plaintiff is not only unable to
17 do his previous work but cannot, considering Plaintiff's age,
18 education and work experiences, engage in any other substantial
19 gainful work which exists in the national economy. 42 U.S.C. §§
20 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability
21 consists of both medical and vocational components. *Edlund v.*
22 *Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

23 The Commissioner has established a five-step sequential
24 evaluation process for determining whether a claimant is disabled. 20
25 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is
26 engaged in substantial gainful activities. If the claimant is engaged
27 in substantial gainful activities, benefits are denied. 20 C.F.R. §§

1 404.1520(a)(4)(I), 416.920(a)(4)(I).

2 If the claimant is not engaged in substantial gainful activities,
3 the decision maker proceeds to step two, which determines whether the
4 claimant has a medically severe impairment or combination of
5 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If
6 the claimant does not have a severe impairment or combination of
7 impairments, the disability claim is denied.

8 If the impairment is severe, the evaluation proceeds to the third
9 step, which compares the claimant's impairment with a number of listed
10 impairments acknowledged by the Commissioner to be so severe as to
11 preclude substantial gainful activity. 20 C.F.R. §§
12 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P, App.
13 1. If the impairment meets or equals one of the listed impairments,
14 the claimant is conclusively presumed to be disabled.

15 If the impairment is not one conclusively presumed to be
16 disabling, the evaluation proceeds to the fourth step, which
17 determines whether the impairment prevents the claimant from
18 performing work he or she has performed in the past. If plaintiff is
19 able to perform his or her previous work, the claimant is not
20 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
21 this step, the claimant's residual functional capacity ("RFC")
22 assessment is considered.

23 If the claimant cannot perform this work, the fifth and final
24 step in the process determines whether the claimant is able to perform
25 other work in the national economy in view of his or her residual
26 functional capacity and age, education and past work experience. 20
27 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482

1 U.S. 137 (1987).

2 The initial burden of proof rests upon the claimant to establish
3 a *prima facie* case of entitlement to disability benefits. *Rhinehart*
4 *v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d
5 1111, 1113 (9th Cir. 1999). The initial burden is met once the
6 claimant establishes that a physical or mental impairment prevents him
7 from engaging in his or her previous occupation. The burden then
8 shifts, at step five, to the Commissioner to show that (1) the
9 claimant can perform other substantial gainful activity, and (2) a
10 "significant number of jobs exist in the national economy" which the
11 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir.
12 1984).

13 ALJ'S FINDINGS

14 At step one of the sequential evaluation process, the ALJ found
15 Plaintiff has not engaged in substantial gainful activity since
16 January 1, 2002, the alleged onset date. (Tr. 20.) At steps two and
17 three, he found Plaintiff has the severe impairments of major
18 depressive disorder, borderline personality disorder, obesity and
19 chronic hypothyroidism, but the impairments do not meet or medically
20 equal one of the listed impairments in 20 C.F.R., Appendix 1, Subpart
21 P, Regulations No. 4 (Listings). (Tr. 20, 23.)¹ The ALJ then
22

23
24 ¹Plaintiff also alleged physical limitations due to pain in her
25 neck, back, shoulder, right leg and knees, as well as severe
26 headaches. (Tr. 339, 344-45.) The ALJ found no objective medical
27 evidence supporting Plaintiff's allegations of physical limitations
28 other than those which would be indicated by her obesity. (Tr. 22.)

1 determined:

2 [C]laimant has the residual functional capacity to perform
3 work at the light to medium exertional level, relative to
4 her obesity, consisting of the ability to: lift and/or carry
5 and push and/or pull up to 15 to 20 pounds frequently and 30
6 to 40 pounds occasionally; sit up to 6 hours in an 8 hour
7 work day with normal breaks; stand and/or walk at least 6
8 hours in an 8 hour day with normal breaks; and, occasionally
9 stoop, bend and other postural adjustments. The claimant
10 would have no manipulative limitations with her hands. The
11 claimant would be required to wear corrective lenses. In
addition, the claimant could attend to her personal care, is
oriented in all spheres and can perform household chores
although she should not work where children are left alone.
The claimant would also have a moderate limitation in her
ability to interact appropriately with the general public
and making goals independently of others. All other effects
on the claimant's mental functioning in a work setting would
be slight to none and would have no affect on the claimant's
ability to function well.

12 (Tr. 23.) At step four, the ALJ found Plaintiff is unable to perform
13 any past relevant work. (Tr. 28.) Based on vocational expert
14 testimony and the Plaintiff's age, education, work experience and
15 residual functional capacity, the ALJ concluded there are jobs that
16 exist in significant numbers in the national economy that the claimant
17 can perform. (Tr. 28.) As such, the ALJ found Plaintiff was not
18 under a disability as defined in the Social Security Act at any time
19 through the date of the decision. (Tr. 29.)

20 ISSUES

21 The question is whether the ALJ's decision is supported by
22 substantial evidence and free of legal error. Specifically, Plaintiff
23 argues the ALJ erroneously relied on the opinion of the medical expert
24 and failed to properly reject the opinions of examining psychologists.
25 (Ct. Rec. 18 at 12.) Defendant argues the ALJ properly considered
26 _____
27 Plaintiff does not challenge this finding and the court concludes it
28 is supportive by substantial evidence.

1 the medical opinions. (Ct. Rec. 25 at 6.)

2 **DISCUSSION**

3 Plaintiff argues the ALJ inappropriately adopted the testimony of
4 the consulting medical expert, Dr. Klein, and improperly used his
5 testimony as the basis to reject the opinions of Dr. Wert and Dr.
6 Rosekrans, examining psychologists. (Ct. Rec. 18 at 15.) Defendant
7 argues the ALJ did not reject the opinions of Dr. Rosekrans or Dr.
8 Wert, but did not give them controlling weight. (Ct. Rec. 25 at 6.)
9 Defendant further argues the ALJ provided valid reasons for the weight
10 given to the opinions of the examining psychologists. (Ct. Rec. 25 at
11 6.)

12 Dr. Rosekrans examined Plaintiff on October 21, 2004, and
13 prepared a psychological assessment. (Tr. 155-62.) He diagnosed
14 adjustment disorder with mixed anxiety and depressed mood and sexual
15 disorder not otherwise specified (NOS) and assessed a GAF score of 50.²
16 (Tr. 159.) He noted that Plaintiff reported dyslexia, but tests
17 reflected she is in the low normal range of intelligence and had
18 worked successfully in the past. (Tr. 159.) Dr. Rosekrans noted
19 Plaintiff's alleged dyslexia "would be of concern in certain
20 occupations or school situations and should be investigated if she has
21 vocational training." (Tr. 159.)

22 Dr. Wert conducted a psychological/psychosexual assessment on
23 March 2, 2005. (Tr. 181-92.) Plaintiff was referred to Dr. Wert by

24 ²A GAF score of 41-50 indicates serious symptoms or any serious
25 impairment in social, occupation, or school functioning. DIAGNOSTIC AND
26 STATISTICAL MANUAL OF MENTAL DISORDERS, 4TH Ed. at 32.
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1 the Division of Children and Family Services. (Tr. 181.) He
2 diagnosed major depression, recurrent, severe, without psychotic
3 features; generalized anxiety disorder; posttraumatic stress disorder;
4 somatization disorder; personality disorder NOS, severe, with
5 schizoid, avoidant, depressive, dependent, antisocial and self-
6 defeating traits. (Tr. 191-92.) Dr. Wert assessed a GAF score of 40-
7 50.

8 On a DSHS psychological/psychiatric evaluation form dated March
9 7, 2005, Dr. Wert assessed marked functional mental disorders of
10 depressed mood, social withdrawal, paranoid behavior, physical
11 complaints and global illness, as well as a moderate functional mental
12 disorder in verbal expression of anxiety or fear. (Tr. 198.) He
13 assessed marked limitations in three areas: the ability to exercise
14 judgment and make decisions; the ability to interact appropriately in
15 public contacts; and the ability to respond appropriately to and
16 tolerate the pressure and expectations of a normal work setting. (Tr.
17 199.) Dr. Wert also assessed moderate limitations in four areas: the
18 ability to understand, remember and follow complex instructions; the
19 ability to learn new tasks; the ability to relate appropriately to co-
20 workers and supervisors; and in the ability to care for self,
21 including personal hygiene and appearance. (Tr. 199.)

22 Dr. Rosekrans assessed Plaintiff a second time on February 6,
23 2006, and completed a DSHS psychological/psychiatric evaluation form.
24 (Tr. 244-51.) Dr. Rosekrans diagnosed major depressive disorder,
25 recurrent, moderate; posttraumatic stress disorder; personality
26 disorder NOS, dependent, avoidant, antisocial features; and assessed
27 a GAF score of 50. (Tr. 246.) Dr. Rosekrans noted Plaintiff is quite
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1 dependent and needs counseling. (Tr. 247.) He stated Plaintiff
2 "[m]ay be using her physical problems as a way to avoid becoming more
3 independent and looking for a job," and opined she "will eventually be
4 able to hold a job, but should first be in counseling, and may also
5 need some training in a job she can physically handle." (Tr. 247.)

6 Dr. Rosekrans assessed moderate functional mental disorders in
7 depressed mood, social withdrawal, physical complaints and global
8 illness. Moderate functional limitations were assessed in the ability
9 to understand, remember and follow complex instructions, the ability
10 to learn new skills, and the ability to exercise judgment and make
11 decisions. (Tr. 250.) Dr. Rosekrans assessed marked functional
12 limitations in the ability to relate appropriately to co-workers and
13 supervisors and in the ability to respond appropriately to and
14 tolerate the pressures and expectations of a normal work setting. (Tr.
15 250.)

16 Dr. Klein testified as the non-examining medical expert at the
17 hearing on March 22, 2007. (Tr. 324-34.) Dr. Klein diagnosed major
18 depressive disorder, posttraumatic stress disorder, and borderline
19 personality disorder. (Tr. 325.) He opined that Plaintiff has
20 moderate limitations in only two areas: interacting appropriately with
21 the public and setting realistic goals or making plans independently
22 of others. (Tr. 325.) In all other areas, Dr. Klein assessed slight
23 to no impairment. (Tr. 325.) He explained Plaintiff's emotional
24 problems were in place when she worked in the past and were not the
25 reasons for discontinuing work. (Tr. 325.) He noted that while her
26 eighth grade education is problematic, her IQ indicates the ability to
27 learn is intact. (Tr. 325-36.) He opined that Plaintiff can perform

1 simple unskilled labor. (Tr. 326.)

2 Other treatment records include notes from the Community Health
3 Association of Spokane (CHAS) dated February 2003 to October 2006.
4 (Tr. 210-228, 260-312). Plaintiff received physical and mental health
5 treatment from CHAS providers, but no counseling. Also included in
6 the medical record are emergency room notes from Sacred Heart Medical
7 Center and Deaconess Medical Center. (Tr. 201-09, 252-53, 254-59.)

8 In making a residual functional capacity determination, the ALJ
9 must consider the opinions of acceptable medical sources about the
10 nature and severity of the Plaintiff's impairments and limitations.

11 20 C.F.R. §§ 404.1527, 416.927; S.S.R. 96-2p; S.S.R. 96-6p.
12 Acceptable medical sources include, among others, licensed physicians
13 and psychologists.³ 20 C.F.R. §§ 404.1513(a), 416.913(a). A treating
14 or examining physician's opinion is given more weight than that of a
15 non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th
16 Cir. 2004). If the treating or examining physician's opinions are
17 not contradicted, they can be rejected only with "clear and
18 convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
19 1996). If contradicted, the ALJ may reject the opinion if he states
20 specific, legitimate reasons that are supported by substantial
21 evidence. *See Flaten v. Secretary of Health and Human Serv.*, 44 F.3d
22 1453, 1463 (9th Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747,
23 753 (9th Cir. 1989); *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989).

24
25 ³Other acceptable medical sources are licensed podiatrists and
26 optometrists and qualified speech-language pathologists, in their
27 respective areas of specialty only. 20 C.F.R. §§ 404.1513(a),
28 416.913.(a).

1 Historically, the courts have recognized conflicting medical evidence,
2 the absence of regular medical treatment during the alleged period of
3 disability, and the lack of medical support for doctors' reports based
4 substantially on a claimant's subjective complaints of pain, as
5 specific, legitimate reasons for disregarding the treating physician's
6 opinion. See *Flaten*, 44 F.3d at 1463-64; *Fair*, 885 F.2d at 604.

7 The opinions of Dr. Wert and Dr. Rosekrans, examining
8 psychologists, are contradicted by the opinion of Dr. Klein, at least
9 as to the existence and severity of Plaintiff's limitations.⁴ Dr. Wert
10 and Dr. Rosekrans both assessed two marked limitations for at least
11 two functional categories and moderate limitations for a number of
12 functional abilities; Dr. Klein assessed only two moderate limitations
13 and no marked limitations. The ALJ explicitly adopted the opinion of
14 Dr. Klein and assigned "lesser weight" to the opinions of Dr. Wert,
15 Dr. Rosekrans, and Plaintiff's treating health care providers. (Tr.
16 27.) As such, the ALJ was required to set forth specific, legitimate
17 reasons supported by substantial evidence for rejecting the opinions
18 of Dr. Wert and Dr. Rosekrans.

19 The ALJ listed several reasons for adopting Dr. Klein's opinion
20 regarding Plaintiff's limitations. First, the ALJ asserted Dr.
21 Klein's testimony is "supported by the bulk of the evidence in the
22 record." (Tr. 27.) However, the ALJ did not cite any particular
23 evidence in the record consistent with Dr. Klein's opinion. The
24 medical record primarily consists of the opinions of Drs. Wert and
25 Rosekrans, CHAS records, and emergency room records. The ALJ did not

26
27 ⁴Dr. Klein testified he was "essentially in agreement" with the
28 diagnoses of Dr. Wert and Dr. Rosekrans. (Tr. 327.)

1 explain how these records are more consistent with Dr. Klein's opinion
2 that the opinions of Dr. Wert and Dr. Rosekrans which assessed greater
3 limitations. This is not a sufficiently specific reason for adopting
4 the opinion of the non-examining psychologist.

5 The second reason given by the ALJ for adopting Dr. Klein's
6 opinion is his testimony is "persuasive and reasonable based on the
7 nature of claimant's mental impairments." (Tr. 27.) The meaning of
8 this statement is not clear and the ALJ did not explain it or support
9 it with citations to the record. Although the ALJ found Dr. Klein's
10 testimony persuasive, that fact alone is not a specific, legitimate
11 reason for adopting his opinion.

12 The ALJ also mentioned that he adopted Dr. Klein's testimony
13 because it is "more consistent with the claimant's subjective
14 complaints at the time of her initial application for benefits." (Tr.
15 26.) Again, the ALJ's statement is not entirely clear. The ALJ made
16 a properly supported negative credibility finding⁵ (Tr. 25, 27) and
17 seems to suggest Plaintiff's alleged symptoms increased over the
18 course of the disability process. However, he also acknowledged
19 Plaintiff alleged depression and difficulty learning new tasks in her
20 application for benefits. (Tr. 25, 113.) The ALJ noted Plaintiff
21 stated her depression makes her not want to be around others (Tr. 25,
22 110), and she indicated difficulties with understanding, following
23 instructions, memory, completing tasks, getting along with others and
24 concentration. (Tr. 25, 113.) Plaintiff also stated she feared large

25 ⁵Plaintiff does not challenge the ALJ's negative credibility
26 finding. The court concludes it is properly supported by substantial
27 evidence.
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1 groups and strangers (Tr. 25, 114) and had increased depression. (Tr.
2 25, 116, 123.) These allegations could be consistent with a range of
3 limitations, including those identified by Drs. Wert, Rosekrans and
4 Klein, and it is not immediately clear how these alleged symptoms are
5 more in keeping with Dr. Klein's opinion than the opinions of Dr. Wert
6 and Dr. Rosekrans. This reason is therefore not a specific,
7 legitimate reason supported by substantial evidence for rejecting the
8 reports of the examining psychologists.

9 With respect to Dr. Wert's opinion, the ALJ asserted, "Dr. Klein
10 indicated that he believed Dr. Wert's response to the State request
11 for information was completed in an exaggerate [sic] way especially if
12 based on the claimant's exaggerated personality testing scales." (Tr.
13 25-26.) The ALJ also noted that Dr. Wert's opinion was "likely
14 exaggerated" because of the child protection issues at stake and the
15 test results in support of Dr. Wert's opinion "were not entirely
16 valid." (Tr. 27.) These comments overstate Dr. Klein's testimony
17 regarding Dr. Wert's opinion. Dr. Klein first testified that he
18 essentially agreed with Dr. Wert regarding Plaintiff's diagnosis.
19 (Tr. 327.) Then Dr. Klein said,

20 Dr. Wirt [sic] added to our list of testing here an
21 MMPI and a Milan [sic] Clinical Multiaxial Inventory, Third
22 Edition. The Milan [sic] *appeared to be filled out in an*
23 *exaggerated way, not totally valid*, someone who is, has sort
24 of an odd type of, of response for someone who's attempting
25 to regain custody and you would think that, that person, if
they were going to fill out, get tested in, in an invalid
way would minimize to an unrealistic degree, the amount of
symptom complaints. And that would be sort of a natural
tendency. But here we have the opposite.

26 (Tr. 327, emphasis added.) Dr. Klein's comment about the Millon
27 results reflects on Plaintiff's odd responses, not on the validity of
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1 Dr. Wert's testing or an exaggerated analysis. It is not a reasonable
2 inference from Dr. Klein's comment noting possible exaggerated test
3 responses that Dr. Wert's opinion was exaggerated or that the overall
4 test results were not valid. Dr. Wert also acknowledged the possible
5 exaggeration and presumably took it into account in his opinion. (Tr.
6 188.) The suggestion that Dr. Wert was motivated to exaggerate his
7 opinion to the point of invalidity is without basis in the record.

8 Furthermore, the DSHS psychological/psychiatric assessment form
9 completed by Dr. Wert a few days after his written opinion appears to
10 have been overlooked. On cross-examination, Dr. Klein was asked about
11 Dr. Wert's opinion that Plaintiff's psychological impairment was
12 severe. (Tr. 332.) Dr. Klein responded:

13 Well, he, he was answering the question, was she
14 capable of having her child returned to her custody. He did
15 not speak to the issue with her for ability or adaptation to
16 the work place and you, know, I think we have to understand
the context of Dr. Wirt's [sic] report, what it was he was
asked to assess.

17 (Tr. 332.) However, Dr. Wert did provide his opinion with regard to
18 Plaintiff's limitations in the workplace. (Tr. 197-200.) Dr. Wert
19 was asked to rate Plaintiff's cognitive and social limitations
20 regarding Plaintiff's ability to perform on a normal day-to-day work
21 basis. (Tr. 199.) He responded by assessing three marked limitations
22 and four moderate limitations. (Tr. 199.) The ALJ did not mention
23 Dr. Wert's work-related assessment in his summary of Dr. Wert's
24 records (Tr. 21) or in rejecting Dr. Wert's opinion (Tr. 25); in fact,
25 the DSHS form completed by Dr. Wert is not mentioned in the ALJ's
26 decision. While the ALJ is not required to discuss every piece of
27 evidence in the record, he is required to discuss reasons for

1 rejecting significant probative evidence. *Vincent v. Heckler*, 739
2 F.2d 1393, 1394-95 (9th Cir. 1984). In this case, the ALJ erred by
3 failing to discuss Dr. Wert's opinion about Plaintiff's work-related
4 limitations.

5 The ALJ also agreed with Dr. Klein's assessment that Plaintiff
6 was capable of working in the past with her mental condition and there
7 is no evidence she could not continue to do so. (Tr. 27.) However,
8 there is little evidence in the record to support this assumption.
9 Plaintiff's last reported work efforts were in 1988 or 1989, at least
10 three years before her application for benefits. (Tr. 338.) There is
11 no evidence in the record about Plaintiff's performance in previous
12 jobs. Furthermore, there is no evidence about Plaintiff's mental or
13 physical status during the periods she was employed. The assumptions
14 that Plaintiff functioned adequately at work and under the same level
15 of impairment several years before the record begins is not supported
16 by substantial evidence in the record.

17 The ALJ relied almost exclusively on Dr. Klein's opinion to
18 justify giving "lesser weight" to the opinions of Drs. Wert and
19 Rosekrans. However, the opinion of a non-examining physician cannot
20 by itself constitute substantial evidence that justifies the rejection
21 of the opinion of either an examining physician or a treating
22 physician. *Lester*, 81 F.3d at 831, citing *Pitzer v. Sullivan*, 908
23 F.2d 502, 506 n.4 (9th Cir. 1990). The opinion of a non-examining
24 physician may be accepted as substantial evidence if it is supported
25 by other evidence in the record and is consistent with it. *Andrews v.*
26 *Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Lester v. Chater*, 81 F.3d
27 821, 830-31 (9th Cir. 1995). Cases have upheld the rejection of an
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1 examining or treating physician based on part on the testimony of a
2 non-examining medical advisor; but those opinions have also included
3 reasons to reject the opinions of examining and treating physicians
4 that were independent of the non-examining doctor's opinion. *Lester*,
5 81 F.3d at 831, citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th
6 Cir. 1989) (reliance on laboratory test results, contrary reports from
7 examining physicians and testimony from claimant that conflicted with
8 treating physician's opinion); *Roberts v. Shalala*, 66 F.3d 179 (9th
9 Cir. 1995) (rejection of examining psychologist's functional
10 assessment which conflicted with his own written report and test
11 results). Thus, case law requires not only an opinion from the
12 consulting physician but also substantial evidence (more than a mere
13 scintilla but less than a preponderance), independent of that opinion
14 which supports the rejection of contrary conclusions by examining or
15 treating physicians. *Andrews*, 53 F.3d at 1039.

16 Here, the ALJ failed to identify any evidence apart from Dr.
17 Klein's opinion which justifies rejecting the opinions of two
18 examining physicians. The reasons provided by the ALJ for adopting
19 Dr. Klein's opinion are not specific, legitimate reasons supported by
20 the record. The ALJ gave an inadequately supported reason for giving
21 little weight to Dr. Wert's opinion, did not discuss Dr. Wert's DSHS
22 report containing significant probative evidence, and gave no specific
23 reasons for rejecting Dr. Rosekrans' opinions. Therefore, the ALJ did
24 not properly justify adopting the opinion of a non-examining
25 psychologist over the opinions of two examining psychologists. Thus,
26 the ALJ erred.

27 There are two remedies where the ALJ fails to provide adequate
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1 reasons for rejecting the opinions of a treating or examining
2 physician. The general rule, found in the *Lester* line of cases, is
3 that "we credit that opinion as a matter of law." *Lester v. Chater*,
4 81 F.3d 821, 834 (9th Cir. 1996); *Pitzer v. Sullivan*, 908 F.2d 502, 506
5 (9th Cir. 1990); *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989).
6 Another approach is found in *McAllister v. Sullivan*, 888 F.2d 599 (9th
7 Cir. 1989), which holds a court may remand to allow the ALJ to provide
8 the requisite specific and legitimate reasons for disregarding the
9 opinion. See also *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir.
10 2004) (court has flexibility in crediting testimony if substantial
11 questions remain as to claimant's credibility and other issues).
12 Where evidence has been identified that may be a basis for a finding,
13 but the findings are not articulated, remand is the proper
14 disposition. *Salvador v. Sullivan*, 917 F.2d 13, 15 (9th Cir. 1990)
15 (citing *McAllister*); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1202 (9th
16 Cir. 1990). In this case, there may be specific, legitimate reasons
17 for disregarding the opinions of the examining physicians which have
18 not been properly articulated. Thus, remand is the proper remedy.

19 CONCLUSION

20 Having reviewed the record and the ALJ's findings, the court
21 concludes the ALJ's decision is not supported by substantial evidence
22 and is based on legal error. On remand, the ALJ shall properly
23 consider the medical opinion evidence and make a new RFC determination
24 based on articulated and properly justified reasoning. Accordingly,

25 IT IS ORDERED:

26 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is
27 **GRANTED**. The matter is remanded to the Commissioner for additional

1 proceedings pursuant to sentence four 42 U.S.C. 405(g).

2 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 24**) is
3 **DENIED.**

4 3. An application for attorney fees may be filed by separate
5 motion.

6 The District Court Executive is directed to file this Order and
7 provide a copy to counsel for Plaintiff and Defendant. Judgment shall
8 be entered for Plaintiff and the file shall be **CLOSED.**

9 DATED March 2, 2009.

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11 S/ CYNTHIA IMBROGNO
12 UNITED STATES MAGISTRATE JUDGE
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